**UNITED STATES PATENT AND TRADEMARK OFFICE**
**Trademark Trial and Appeal Board**
**P.O. Box 1451**
**Alexandria, VA 22313-1451**

Mailed: March 28, 2005

Cancellation No. 92032341

PRAMIL S.R.L.

v.

MICHEL FARAH

Thomas W. Wellington
Interlocutory Attorney,
Trademark Trial and Appeal Board:

On June 30, 2004, the Board issued an order wherein, *inter alia*, the trial dates for this proceeding were rescheduled; petitioner's main testimony period was scheduled to close on September 29, 2004 and respondent's testimony period to close on November 28, 2004.

On October 19, 2004, petitioner filed a motion to extend the time for it to file deposition testimony taken during its testimony period. On October 26, 2004, petitioner filed the testimonial deposition transcript of Jacob Aini. Respondent did not file a response to this motion.

On November 29, 2004, respondent filed a motion for an extension of its testimony period by thirty days. In respondent's motion, respondent states that he was not able

to obtain petitioner's consent. Petitioner did not file a response to this motion.

On December 23, 2004, respondent filed a second motion for further extension of his testimony period. By way of this motion, respondent sought an extension of sixty (60) days, until February 28, 2005. On December 27, 2004, petitioner filed its opposition to respondent's second motion for an extension.

On March 1, 2005, respondent filed his third motion to further extend his testimony period. By way of this motion, respondent seeks an extension of forty-five (45) days, until April 14, 2005. On March 2, 2005, petitioner filed its opposition to this motion.

On March 2, 2005, petitioner filed its main trial brief.

We turn first to petitioner's motion for an extension of its time to file the deposition testimony of Jacob Aini. Trademark Rule 2.125 requires the deposing party to serve a copy of the deposition transcript on the opposing within thirty days after the completion of the taking of that testimony. The Rule further provides that should the deposing party not comply with the thirty day provision, the adverse party may seek remedy by way of a motion to extend its testimony period. As already noted, in this case, respondent did not file a response to this motion but he

filed motions, as set forth above and discussed below, to extend his testimony period for other reasons. In view thereof, petitioner's motion to extend its time to file the deposition testimony of Jacob Aini is granted as conceded. Rule 2.127(a).

We now turn to respondent's first two motions for extensions of his testimony period. The first motion (filed November 29, 2004) is granted as conceded. Trademark Rule 2.127(a). Having demonstrated good cause, respondent's second motion to extend its testimony period is granted as well taken. Fed. R. Civ. P. 6(b). Accordingly, the motions in tandem have extended respondent's testimony period so that it closed on February 28, 2005.

Turning now to respondent's third motion, we initially note that it was filed after the close of respondent's testimony period, i.e., his testimony period closed on February 28, 2005 and the motion was filed on March 1, 2005. Because the testimony period in this proceeding had closed, the motion is properly construed as a motion to "reopen" discovery. See TBMP § 509.01 (2d ed. rev. 2004).

Under Fed. R. Civ. P. 6(b)(2), the moving party on a motion to reopen must show that its failure to act during the time previously allotted therefor was the result of excusable neglect. See TBMP § 509.01(b) (2d ed. June 2003) with cases and authorities cited therein.

The analysis to be used in determining whether a party has shown excusable neglect was set forth by the Supreme Court in *Pioneer Investment Services Company v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993), and discussed by the Board in *Pumpkin Ltd. v. The Seed Corps,* 43 USPQ2d 1582 (TTAB 1997). These cases hold that the excusable neglect determination must take into account all relevant circumstances surrounding the party's omission or delay, including (1) the danger of prejudice to the nonmovant, (2) the length of the delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the movant, and (4) whether the movant acted in good faith.

It has been held that the third *Pioneer* factor, i.e., "the reason for the delay, including whether it was within the reasonable control of the movant," may be deemed to be the most important of the *Pioneer* factors in a particular case. See *Pumpkin Ltd. v. The Seed Corps, supra* at n.7 and cases cited therein. See also *Baron Philippe de Rothschild S.A. v. Styl-Rite Optical Mfg. Co.*, 55 USPQ2d 1848, 1851 (TTAB 2000). In this case, respondent's stated reasons for failing to take any testimony during his testimony period, as extended, are not well taken and do not rise to the excusable neglect standard. In his motion, respondent provides the following

terse excuse for his failure to complete testimony during the time allowed:

> "Registrant and his undersigned attorney have been unable to prepare, schedule and present Registrant's testimony and evidence during that time. At present, efforts are underway to schedule the Registrant's testimony during the month of March 2005, in conjunction with the discovery deposition of Mr. Farah in a federal court proceeding involving related parties and the same attorneys. Accordingly, Registrant respectfully requests an additional 45 days, to extend Registrant's testimony period through April 14, 2005."

Respondent's stated reason for reopening his testimony period is not new. Indeed, in respondent's previous two motions for extension of the testimony period, counsel for opposer argued that additional time was necessary because of his "inability to reach an agreement as to the concurrent scheduling of a deposition in a court action involving the same parties" [respondent's first motion for extension] and "[respondent's] attorney is presently involved in preparation for a Federal jury trial that has been schedule to begin on January 18, 2005, and has been recently rescheduled to begin on February 1, 2005" [respondent's second motion for extension]. Respondent had ample time to coordinate his testimony period herein with any other pressing litigation that respondent's counsel, and respondent, may be involved. See *Consolidated Foods Corp. v. Berkshire Handkerchief Co., Inc.,* 229 USPQ 619 (TTAB 1986) (no excusable neglect where defendant's failure to timely respond to summary judgment motion was due to counsel's press of other litigation).

As to the second factor, namely, the length of delay, it is acknowledged that respondent's motion to reopen was filed only one day after the close of his testimony period. However, this also followed a three-month extended testimony period.

Turning to the other factors for determining whether respondent has made the necessary showing of excusable neglect to reopen his testimony period, even if we conclude that petitioner will not be substantially prejudiced by the delay and that respondent acted in good faith, these factors do not overcome the aforementioned factors which are not in respondent's favor; nor do they otherwise demonstrate excusable neglect.

Accordingly, respondent's motion to reopen his testimony period is hereby denied. Fed. R. Civ. P. 6(b). Proceedings herein are resumed and times for filing the remaining briefs on the case are reset as follows (See Trademark Rule 2.128):

| | |
|---|---|
| Defendant's brief shall be due: | May 2, 2005 |
| Plaintiff's reply brief, if any, shall be due: | May 17, 2005 |

An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

* * *